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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 298

HERBERT M. ROSENTHAL AND DUNBAR BUILDERS CORPORATION,

Petitioners,

vs.

HARRY A. ASH, TRUSTEE, MARSHALL M. HOLLEB, NOMINEE, AND H. R. WEISSBERG CORPORATION, DEBTOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR MARSHALL M. HOLLEB, NOMINEE IN OPPOSITION.

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QUESTION PRESENTED.

The only question presented is factual: Did the court of appeals err in holding, under the particular facts and circumstances of this case, that the district court had not abused its discretion in confirming the bankruptcy sale of the Edgewater Beach Hotel to this respondent?

STATEMENT OF THE CASE.

Certain facts are omitted from petitioners' statement of the case.

The Edgewater Beach property was only one of a number of properties of the Debtor. The appraised value of this property was about five million dollars. Secured claims against the property aggregated seven million dollars. (App. 12.)[1] The appraised value of the equity was therefore negative.

The Debtor also held a claim for fire insurance damage. The value of this claim has not been determined. The Debtor has applied for judgment in the amount of $345,000. (Item 12.)[2] The insurance company made a settlement offer of $72,000. (Tr. December 17, 1968, p. 51.) Respondent purchased the insurance claim from the trustee for $200,000. (App. 27.)

There had been offers for the property prior to November 22, 1968. In September, 1968 respondent offered $100,000 for the equity if the trustee kept the insurance claim. $200,000 if the buyer received it. Respondent also agreed to indemnify the trustee against lienholders' claims for deficiency. (App. 32.) The trustee's counsel had indicated that the indemnity agreement had great value to the estate. (App. 33.) In October a widely advertised public sale took place. Respondent and one Harold Shlensky were the only bidders. Since Shlensky refused to indemnify, the bids were for the equity without indemnity. (Tr. Oct. 9, 1969, p. 66.) The highest bid was $410,000 for the equity with the buyer receiving the insurance claim. All bids were re-

1. "App. ....." refers to pages in the Appendix to the petition for certiorari.

2. The record designations used herein are those used in the petition.

jected and the trustee was authorized to sell at private sale. (App. 41.)

The sale of November 22, 1968 was accordingly limited to interested parties with whom the trustee had negotiated. The only bidders were respondent, petitioners, Shlensky and one D'Angelo, whose bid was subsequently withdrawn. Their bids were opened and read aloud; the bidders were authorized to reconsider their bids after a recess and to submit revised sealed bids later the same day. (App. 41.)

Since the terms of the sale had not been specified, the bids were widely divergent as to terms as well as to amounts, and were therefore not readily comparable. With respect to the bids of respondent, petitioner and Shlensky: (a) one bid included an indemnity, the others did not; (b) one bid was for the property free and clear of liens, the other two were for the equity; (c) two bids provided that the buyer should take the fire insurance claim, while one left it with the trustee with an option to sell it to the buyer at an agreed price; (d) each of the bidders deposited a different sum as earnest money.

The particular bids were as follows:

(1) *Holleb* offered to pay $800,000 in cash for the equity, exclusive of insurance proceeds which were to be left with the trustee, except that "at the option of the trustee" Holleb would also acquire the insurance proceeds and would pay an additional amount "equal to the value of such fire loss as agreed upon between the Trustee and the Buyer." Holleb also agreed to indemnify the estate against deficiencies. An earnest money deposit of $100,000 accompanied the offer. (App. 24-26.)

(2) *Shlensky* offered $960,000 for both the equity in the property and the fire insurance proceeds. His bid did not include an agreement to indemnify the estate against deficiencies, nor did he agree to give such indemnity

even after the bids were opened. (Tr. Nov. 22, p. 57.) Shlensky's earnest money deposit was $25,000. (App. 34.)

(3) *Petitioners* offered $8,150,000 for the property free and clear of all liens, $2,000,000 to be paid when clear title could be shown, $2,000,000 two years from said time and the remaining $4,150,000 four years from that time. They would retain the proceeds of the fire insurance. Petitioners would pay additionally an amount equal to the interest payable by the Debtor's estate on the outstanding liens and claims until they were discharged or until the entire purchase price was paid. A real estate contract for the purchase executed by the petitioners and referred to in the November 22 bid as a suggested contract form made the purchase conditional upon obtaining zoning amendments. (App. 50-51.) $200,000 was deposited as earnest money. (Tr. Nov. 22, p. 14.)

As contemplated in Holleb's bid, he and the trustee agreed upon the price at which the buyer would purchase the insurance claim. This was confirmed by respondent's letter to the trustee dated November 27, 1968:

> We have since had an opportunity to review the value of the insurance claim to which we referred in connection with our purchase price. Accordingly, we do herewith agree to purchase such fire loss from the Trustee for the price of $200,000. That amount is to be added to the $800,000 in cash above referred to, making a total purchase price of $1,000,000. (App. 27.)

On December 6, 1968, Shlensky substantially changed his previous bid (a) by offering to relinquish the insurance claim proceeds; (b) by agreeing to indemnify the estate against any claims which may be made against it by any of the holders of any liens and encumbrances, "subject to the right of the undersigned to defend such claims and liens at my expense in the event the Trustee fails to do so"; and (c) by adding $75,000 to his security deposit. (App. 14, 34.)

Pursuant to the district court's request, the trustee asked all bidders to submit information as to their financial responsibility and their intended use of the property. Holleb complied with this request. His letter of December 12, 1968 outlined a plan of development and contained, as an attachment, the commitment of Connecticut General Life Insurance Company to provide all funds required for performance. The other bidders did not respond. (App. 19.)

After hearing extended arguments concerning these divergent bids, the district court determined that the Holleb bid was the highest and best. (App. 16-18.)

Petitioners and Shlensky appealed to the court of appeals from the order confirming the sale to Holleb. The order was affirmed.

ARGUMENT.

1. There Is No Conflict Between Circuits.

There is no conflict between the Seventh Circuit and the Tenth Circuit.

Smith v. *Save-Rite Drug Stores*, 178 F. 2d 507 (10th Cir. 1949), cited by petitioners (pp. 8-10), involved different questions and entirely different facts. In *Smith* a petition for confirmation of a public sale of property to the highest bidder was still pending when an admittedly unsuccessful bidder was given an opportunity to make a second and higher bid. Confirmation of sale on this second bid was reversed—not because the original high bid had been rejected (it had not) but because it had been accepted.

The *Smith* case has been distinguished and confined to its facts by the later case of *J. J. Sugarman Co.* v. *Davis*, 203 F. 2d 931 (10th Cir. 1953). In *Sugarman*, where the original high bid had *not* been accepted, the sale of the

property to a new and higher bidder was affirmed. The court distinguished

> our case of *Smith* v. *Save-Rite Drug Stores, supra,* where the high bid at the sale was accepted and reported to the court with a recommendation that it be confirmed. We called attention that what the court did was to permit a subsequent higher bid while the matter was pending for confirmation on the original bid without first denying confirmation of the sale to the original bidder. (203 F. 2d at 233.)

It may be noted that the Tenth Circuit in *Sugarman* cited and followed the Seventh Circuit case of *Shipe* v. *Consumers Service Co.*, 29 F. 2d 321 (7th Cir. 1928).

The case at bar is closer on its facts to *Sugarman* than to *Smith*, although it differs markedly from both. As in *Sugarman*—and unlike *Smith*—the bids of the appellants in the case below (petitioners and Shlensky) had never been accepted, the property had never been sold to either of them and there was therefore no proceeding to confirm a sale to either.

Other differences between the *Smith* case and the case at bar may be noted. Unlike the *Smith* case where the party attacking the sale had been the high bidder, the petitioners in the case at bar had been the low bidders; their bid was found to be clearly inferior to that of either Holleb or Shlensky (App. 34, 49-51).

Again, unlike the *Smith* case, the party to whom the Edgewater Beach was sold was not an unsuccessful bidder. The statements in the petition (p. 8) that Holleb was "a low bidder" or "an apparent low bidder" on November 22 are completely unfounded, even assuming that the trustee would retain the fire insurance claim. On the contrary, Holleb's bid was found to be the highest and best (App. 18). It was better than the Shlensky bid of November 22 in that it included an indemnity and

permitted the trustee to retain the insurance claim. If the value to the trustee of the insurance claim (which was later sold for $200,000) and the value of the indemnity (which the trustee estimated as being worth more than $200,000 to $300,000: Tr. October 9, 1968, pp. 88-89) exceeded $160,000, then the Holleb price was higher than the Shlensky price (App. 35).

In *Smith* the second bid of the appellee was admittedly a new bid, entirely different from the first. This is not the case with Holleb's November 27 letter. His subsequent agreement to purchase the insurance claim was expressly contemplated in his original bid. As the court of appeals noted, the district court could properly conclude that

> the Holleb communication subsequent to November 22 could reasonably be deemed a clarification of the Holleb November 22 bid, so that the bid so supplemented could be considered consistent with the concept of finality. (App. 37.)

Indeed, if the insurance claim in the hands of the trustee was worth even 80% of what Holleb paid for it, then the letter of November 27 would leave the November 22 bid substantially unchanged.

The *Smith* case involved a public sale where the competing bids were for cash alone and were immediately comparable; there was no room for the exercise of judgment as to which bid was highest and best. The sale at bar, however, was a private sale where the bids were not comparable, the terms were widely divergent and the selection of the best bid required careful analysis and the exercise of judgment and discretion. Among the factors involved were the court's estimates of the value of the indemnity, the value of the insurance claim, the effect of the sale upon the reorganization as well as the buyer's ability to perform.

In *Smith* all the bids were lower than the appraised value. In the case at bar the district court elicited bids which resulted in a sale substantially in excess of the appraised value of the equity.

The controlling rule of law is the same in the Seventh Circuit as in the Tenth, namely, that a confirmed sale in bankruptcy will not be set aside except for an abuse of discretion. In each circuit the determination of whether or not there has been an abuse of discretion depends upon the facts in the particular case.

2. The Decision Below Does Not Sanction Such a Departure from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

After considering all the issues, the court of appeals concluded:

> The results of the efforts from September 6 to November 22 were highly successful for the estate. Although only a few serious bidders came forward, there appears to have been full opportunity for interested persons to bid. We think the district court resolved the questions presented in a manner which can not be said to be an abuse of discretion (App. 40).

In the exercise of its discretion the district court noted the difference between the Holleb letter of November 27, which merely particularized the proposal to purchase the insurance claim contemplated in the November 22 bid, and the entirely new and different Shlensky bid of December 6, 1968. The form of the Holleb bid was not objected to by petitioner or any other party.[3] Moreover, as noted, the

3. The statement that petitioners had not learned until oral argument before the court of appeals that the discussion contemplated in Holleb's November 22 offer had actually taken place (petition p. 10) is patently incorrect. All parties were fully aware of these matters long before the sale was confirmed (e.g., Tr. December 17, 1968).

Holleb bid was reasonably found to be the highest and best bid on November 22 (App. 35).

Certainly petitioners' argument about the proper use of the word option in a bid (petition, p. 10) hardly justifies the drastic step of calling upon this court to discipline both the district court and the court of appeals.

3. There Is No Important Question of Federal Law.

No important question of federal law is raised on this record with respect to "subjective esthetic criteria" (petition, p. 11). As the court of appeals stated:

> We think favorable consideration of the type of development under consideration by the Holleb group was no more than a "make weight" here, and did not exceed proper bounds. (App. 39.)

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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